Supreme Court, U. S.
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No. 73-1378

# In the Supreme Court of the United States

OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

CAMPAIGN CLEAN WATER, INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. B, pp. 35A–53A)[1] is not reported. The opinion of the district court (App. F, pp. 79A–100A) is reported at 361 F. Supp. 689.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit (App. D, pp. 57A–58A) was entered on

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[1] Appendix references are to the combined appendix to the petitions in this case and the companion case of *Train* v. *City of New York*.



534-087—74——1

December 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the allotment by the Administrator of less than the full amounts authorized to be appropriated by Section 207 of the Federal Water Pollution Control Act Amendments is subject to judicial review to determine whether the Administrator abused his discretion in making the allotment.

2. Whether an action to compel the allotment of additional amounts is barred by the doctrine of sovereign immunity.

### STATUTES INVOLVED

Administrative Procedure Act Section 10(2), now 5 U.S.C. 701(a)(2).

> This chapter applies, according to the provisions thereof, except to the extent that * * * agency action is committed to agency discretion by law.

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (33 U.S.C. (Supp. II) 1281 *et seq.*) provide:

> *Sec. 205.* (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.
>
> (b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants

under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

*Sec. 207.* There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 3, 1974, not to exceed $6,000-000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

## STATEMENT

As explained in the petition for a writ of certiorari we are filing simultaneously in *Train* v. *City of New York,* the expenditure of funds under the federal grant program for building approved sewage treatment plants created by Title II of the Federal Water Pollution Control Act Amendments of 1972 involves several stages. This case is another challenge to the action of the Administrator on November 28, 1972, taken pursuant to a direction of the President, in allotting $2 billion of the "not to exceed" $5 billion authorized to be appropriated in Section 207 of the Act for fiscal year 1973, and allotting $3 billion of the "not to exceed" $6 billion authorized for fiscal year 1974.

On January 15, 1973, the plaintiff, an organization of Virginia ecologists, filed a complaint in the United States District Court for the Eastern District of Virginia alleging that the defendant Administrator had a duty to allot all sums authorized by Section 207 or alternatively that his failure to allot more than 45 percent of the funds authorized was an abuse of discretion (Complaint ¶9). The district court held that the Administrator had discretion under the statute to allot less than the full amount authorized (App. F, pp. 95A–96A), but that his decision to allot only 45 percent was an abuse of discretion (App. F, p. 99A).



On appeal, the court of appeals noting that the plaintiff conceded that the Administrator had discretion to allot less than the amounts authorized by Congress (App B, p. 39A), reversed the holding of an abuse of discretion on the ground that it was not supported by the record (App. B, pp. 47A–53A). The court of appeals held, however, that the exercise of the Administrator's discretion is subject to judicial review by a hearing *de novo* in the district court and remanded the case to that court for further proceedings.

## REASONS FOR GRANTING THE WRIT

The issues in this case are closely related to those raised in the petition for certiorari in *Train* v. *City of New York,* which we are filing simultaneously. In *City of New York* the Court of Appeals for the District of Columbia Circuit held that the Administrator has no discretion to allot less than the amount Congress has authorized to be appropriated. In the present case, on the other hand, the district court held that the Administrator does have such discretion, and the court

of appeals found it unnecessary to decide that issue because the plaintiff did not challenge the ruling. The court of appeals did hold, however, that the action of the Administrator in making the allotment was subject to judicial review in the district court to determine whether that action constituted an abuse of discretion. We believe that the district court in the present case correctly held that the Administrator has such discretion, but that the court of appeals erred in concluding that his exercise of that discretion is subject to judicial review.

1. This case involves the important issue of the role of the courts in reviewing decisions made by the executive branch relating to the commitment and expenditure of federal government funds where authority to control the rate of such commitment and expenditure has admittedly been conferred on the Executive Branch by the Congress.

Section 10(2) of the Administrative Procedure Act, now 5 U.S.C. 701(a)(2), precludes judicial review under that Act of "agency action" that is "committed to agency discretion by law." In *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, this Court held that a suit to compel the Canal Company to proscribe new tolls for the use of the Canal and to refund tolls allegedly illegally collected raised an issue "committed to agency discretion" and not subject to judicial determination. The Court pointed out that determining the proper level of tolls for the Canal "involve[s] nice issues of judgment and choice * * * which require the exercise of informed discretion" and requires the Canal Company to make "questions



of judgment requiring close analysis and nice choices" (356 U.S. at 317, 318).

That principle, we submit, is equally applicable to this situation, so that the action of the Administrator in allotting less than the amount appropriated similarly is not subject to judicial reexamination, even where it is claimed that such allotment constitutes an abuse of discretion. In deciding in the fall of 1972 the amount of funds to allot for fiscal years 1973 and 1974, it was necessary to make estimates of the level and timing of spending that would ensue from any given level of commitment, the income resources likely to be available to the federal government during those years, the nature of competing program needs and demands, the state of the economy, and the impact of the spending on the economy. The very nature of those judgments makes it inappropriate for the courts to attempt to review the Administrator's judgment, and particularly under the necessarily vague standard of "abuse of discretion."

The court of appeals relied on dictum in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410, referring to Section 10(2) as "a very narrow exception" (App. B, p. 45A). But that dictum, uttered in the narrow context of a wholly different case involving different policy considerations, should not control here. *Overton Park* involved a statute which provided explicit directions to the Secretary of Transportation relating to the use of park spaces for highways. The issue here, on the other hand, is more like that in *Panama Canal Co.*, and that case, rather than *Overton Park*, provides the governing principle.

2. In our petition for certiorari in the *City of New York* case, we also explained why we believe that an action to compel allotment is barred by the doctrine of sovereign immunity. The arguments there made are equally applicable to this suit.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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